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No. _____

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

Canadian Consulate,
Petitioner,

v.

Arlene Holden,
Respondent.

On Petition for a Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI AND APPENDICES TO THE PETITION

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QUESTION PRESENTED

Does a foreign state engage in "commercial activity" outside the scope of sovereign immunity as codified in the Foreign Sovereign Immunities Act of 1976 in employing locally-engaged personnel to carry out those consular functions recognized by international treaty?

PARTIES IN THE PROCEEDING

The parties in this proceeding are petitioner Canadian Consulate and respondent Arlene Holden.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Canadian Consulate respectfully prays that a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals in this matter filed on August 9, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this case, *Holden v. Canadian Consulate*, 98 F.3d 918 (9th Cir. 1996) is reproduced in the Appendix ("App.") at 101-12. The unreported decision of the United States District Court for the Northern District of California is reproduced at App. 113-26.

JURISDICTION

The court of appeals filed its judgment on August 9, 1996. App. 101-12 *infra*. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. sections 1330, 1391(f), 1441(d), 1602-1611, reads in relevant part as follows:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim

for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has not been made under section 1608 of this title.

App. 138.

§ 1603. Definitions.

For purposes of this chapter . . .

d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

App. 139.

§ 1604. Immunity of a foreign state from jurisdiction.

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

App. 139.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state.

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . .

App. 140.

STATEMENT

In the spring of 1993, the Canadian government closed its San Francisco Consulate General and discharged twenty of the twenty-eight employees who staffed the Consulate, including respondent Arlene Holden ("Holden"). Holden had been employed on the Consulate's staff as a Commercial

Officer since 1980.[1] After learning that she was slated for layoff, Holden unsuccessfully competed for a Commercial Officer position with the Los Angeles Consulate General, which was opening a small satellite Trade Office in San Francisco in the wake of the San Francisco Consulate's closing. Following her failed bid for the Trade Office position and her subsequent discharge, Holden sued petitioner in the district court, contending that she should have been retained by the Los Angeles Consulate on the Trade Office staff, that petitioner's failure to do so constituted age and sex discrimination, and that her discharge breached an alleged implied employment contract between Holden and petitioner.[2]

Petitioner moved to dismiss under Federal Rule of Civil Procedure 12(b) for lack of subject matter jurisdiction, citing its immunity to plaintiff's claims under the Foreign Sovereign Immunities Act of 1976 ("FSIA"). Holden opposed

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[1] As a Commercial Officer, Holden assisted the San Francisco Consulate in its mission to foster and promote bilateral trade and other economic ties between the United States and Canada. Holden reported directly to to the post's Senior Trade Commissioner — a Canada-based employee who was typically assigned to the Consulate for terms of three to four years.

[2] Specifically, Holden's complaint, filed on November 11, 1993, alleged that her discharge violated California statutory proscriptions against age and sex discrimination, that this alleged discrimination also constituted a tortious "wrongful discharge" in violation of California public policy, and that her discharge was in breach of an implied employment agreement and implied covenant of good faith and fair dealing contained within that employment agreement.

the motion, contending that her claims fell within the "commercial activity" exception to the FSIA codified at 28 U.S.C. section 1605(a)(2) (1988). The district court dismissed Holden's statutory claims on alternative grounds, and *sua sponte* ordered an evidentiary hearing to address the issue of plaintiff's activities and responsibilities while employed by petitioner. App. 124-25. The court issued its findings and order denying petitioner's motion on November 1, 1994. App. 126-37.

Relying upon the Seventh Circuit's decision in *Segni v. Commercial Office of Spain*, 835 F.2d 160 (7th Cir. 1987), the district court found that application of the "commercial activity" exception turned upon an analysis of the nature of plaintiff's employment activities. Finding that Holden was involved primarily in "gathering promotional and marketing information" for petitioner, and that she did not engage in any lobbying activity or other work that was "governmental" in nature, the district court concluded that Holden's employment "is best described as a contract under which she provided marketing services to defendant", and was therefore commercial in nature. App. 135.

The district court also discussed, but declined to apply, a comment in the FSIA's legislative history addressing employment activities by foreign states. The comment states:

> Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.

H. Rep. No. 94-1487, 94th Cong., 2d Sess. 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6615. App. 142. First, the court concluded that Holden was not a "civil servant", citing the absence of competitive civil service exams for locally-engaged staff,[3] in addition to the absence of tenure and other unspecified "civil servant protections." App. 136. Since Holden was not employed as a civil servant, the court reasoned, the above-quoted comment had no application to her claims. Second, the district court declined to adopt Holden's reading of the foregoing comment as suggesting a *per se* rule requiring that any employment of an American citizen by a foreign state be cast as a "commercial activity", holding that the inquiry should instead turn upon consideration "of the nature of the particular citizen's employment activities." App. 134.

Petitioner obtained interlocutory review of the district court's order under the collateral order doctrine. *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 779 (9th Cir. 1991). The district court stayed further proceedings in the case pending resolution of the appeal.

The court of appeals affirmed. The court commenced its discussion by citing to a number of well-established principles governing application of the "commercial activity"

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[3] Like other consulates and embassies operated by Canada in the United States and elsewhere, the San Francisco Consulate was staffed preponderantly by "locally-engaged staff". In the San Francisco Consulate, 23 of the 28 officers who were employed at the time it was closed, including Holden, were locally-engaged staff. App. 129.

exception — including the requirement that, in order for the exception to apply, a plaintiff's claim must be "based upon" the commercial activity in question,[4] that a plaintiff's claim is "based upon" those activities that are elements of the claim that would entitle the plaintiff to relief,[5] and that in determining the character of an activity, courts must examine the nature of the conduct, rather than its purpose.[6] App. 108-09.

Rather than grapple with the difficult task of identifying the nature of the activity underlying Holden's claims, the court of appeals opted to anchor its analysis in two brief excerpts from the FSIA's legislative history, which taken together suggested for the court of appeals a terse "standard" providing that:

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[4] "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... in which the action is based upon a commercial activity carried on in the United States by the foreign state . . .". 28 U.S.C. § 1605(a)(2).

[5] *Saudi Arabia v. Nelson*, 507 U.S. 349, 354-55 (1993). The court of appeals summarily identifies the conduct that Holden's claims are "based upon" as "the fact that she was terminated and a younger man was not." App. 108. Oddly, after identifying this conduct, the court completely disregards it in its subsequent analysis — notwithstanding the dictates of *Nelson* and the relevant statutory language.

[6] 28 U.S.C. § 1603 (d).

> . . . [E]mployment of diplomatic, civil service or military personnel is governmental and the employment of other personnel is commercial.

App. 109. After announcing this standard, the lower court evaluated Holden's employment, concluding that, since she was not employed as either a "civil servant" or a "diplomat", her employment with the San Francisco Consulate was "commercial" — and accordingly petitioner was not entitled to sovereign immunity from her employment-related claims.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW PRESENTS IMPORTANT ISSUES OF FOREIGN SOVEREIGN IMMUNITY WHICH WILL SUBSTANTIALLY IMPACT THE SOVEREIGN PREROGATIVES OF FOREIGN STATES IN THE CONDUCT OF CONSULAR AND DIPLOMATIC FUNCTIONS WITHIN THE UNITED STATES.

In passing the FSIA, Congress sought to codify the "restrictive" theory of foreign sovereign immunity, under which foreign nations are subject to suit only "insofar as their commercial activities are concerned". 28 U.S.C. § 1602; *see also Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). As a matter of established international law — which Congress expressly incorporated into the FSIA — foreign states cannot be sued for their public or sovereign acts (*actiones jure imperii*). H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14 (1976) (FSIA intended to preserve immunity in "cases involving acts of a foreign state which are sovereign or

governmental in nature"). The court of appeals decision invades this sphere of protected sovereign activity — in a highly sensitive context that heightens the affront to foreign sovereign immunity preserved by the FSIA, and exposes U.S. diplomatic and consular personnel abroad to reciprocal incursions.

Foreign consulates have, since the founding of the republic, been accorded a range of privileges and immunities that are necessary to the fulfillment of consular functions and are appropriate for the civilized conduct of international affairs.[7] These traditions, which have most recently and comprehensively been formalized through the adoption of the Vienna Convention on Consular Relations,[8] arise out of and are closely associated with the sovereign status of foreign states.[9]

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[7] *See, e.g.*, Versailles Convention on Functions and Privileges of Consular Officers, Jan. 6, 1790, 8 Stat. 106, Treaty Series 84, *reprinted in* Charles I. Bevins, L.L.B., *Treaties and Other International Agreements of the United States of America 1776-1999*; Luke T. Lee, *Consular Law and Practice* 3-27 (2d ed. 1991).

[8] Vienna Convention on Consular Relations and Optional Protocal on Disputes, Mar. 19, 1967, 596 U.N.T.S. 261, 21 U.S.T. 77. App. 143-57.

[9] The privileges and immunities extended under the Vienna Convention on Consular Relations parallel the protections accorded to embassies and other diplomatic missions as set forth in the Vienna Convention on Diplomatic Relations, which "codified a wide range of diplomatic protections accorded foreign missions over the centuries, and recognized the independence and sovereignty of mission premises that existed under

(footnote continued...)

The consulate's role as an extension and embodiment of the foreign state's sovereign presence abroad is manifest under the terms of the Vienna Convention on Consular Relations. Among the responsibilities undertaken by the receiving states which are parties to the Convention is the obligation to take all appropriate steps to protect the consular premises against any impairment of its dignity,[10] to respect the "inviolability" of consular premises, archives, and documents,[11] to accord consular officers "due respect"; and to extend such officers immunity to civil liability and criminal prosecution, except in limited circumstances.[12] These and other protections, privileges, and immunities extended under the Vienna Convention on Consular Relations all carry the force of international law — and each underscores the

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customary international law." *767 Third Ave. Assoc. v. Permanent Mission of the Republic of Zaire*, 988 F.2d 295, 300 (2nd. Cir.), *cert. denied*, 114 S. Ct. 74 (1993), citing Higgins, Comment, *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*, 79 Am. J. Int'l L. 641-42 (1985).

[10] *See* Vienna Convention on Consular Relations, *supra*, art. 31. App. 153.

[11] *See* Vienna Convention on Consular Relations, *supra*, art. 33. App. 154.

[12] *See* Vienna Convention on Consular Relations, *supra*, arts. 40 and 41. App. 154-155.

sovereign dimension of consulates, a characteristic which defines and legitimizes consular activities.[13]

It is precisely these consular activities which are exposed to suit through the court of appeals' decision.[14] In erroneously holding that petitioner's employment of respondent constitutes a "commercial activity", the court of appeals subjects petitioner (and potentially other foreign states) to a highly invasive form of litigation that, if permitted to proceed, would confound the sovereign immunity

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[13] *See, e.g., Rodriguez v. Republic of Costa Rica*, 934 F. Supp. 493, 500 (D. Puerto Rico 1996) ("The establishment, administration, and operation of a consulate is not a commercial activity"); *MacArthur Area Citizens Association v. Republic of Peru*, 809 F.2d 918, 920 (D.C. Cir.), *modified on other grounds*, 823 F.2d 606 (D.C. Cir. 1987) (rejecting assertion that Peru had engaged in commercial activity by renting office space for a chancery building, and concluding that such activity is "by its *nature*, governmental, not commercial.")(emphasis in original, citations omitted); *S&S Machinery Co. v. Masinexportimport*, 802 F. Supp. 1109, 1112 (S.D.N.Y. 1992) (judgment creditor's attempt to attach Romanian Consulate building was barred by sovereign immunity; court recognized the "axiom" that "only a sovereign can operate a Consulate and undertake the activities for which such a building is used."); *Liberian Eastern Timber Corp. v. Government of Republic of Liberia*, 659 F. Supp. 606 (D.D.C. 1987) (denying civil judgment creditor's attempt to attach bank accounts maintained by consulate).

[14] Article 5 of the Vienna Convention recites those activities which are entitled to recognition and protection as "consular functions" under the terms of the treaty. *See* Vienna Convention on Consular Relations, *supra*, art. 5. App. 149-51.

traditionally extended to the activities of foreign consulates — and preserved by the FSIA.

Employment litigation such as that initiated by Holden is never simple and is rarely limited to an isolated employment decision. Such claims are frequently characterized by far-ranging discovery measures addressing other "similarly-situated" employees in an effort to establish a "pattern or practice" of discrimination or other wrongful conduct.[15] Further, the rationale for a given employment decision — a discharge, for example — is often attacked as pretextual. Such allegations require the employer to justify its decision at trial, and to accommodate extensive pre-trial discovery into any matters that reasonably relate to that justification.[16] In the case of a performance-related discharge, a consulate could be called upon to disclose sensitive or confidential matters falling within the plaintiff's job responsibilities in order to demonstrate the existence of legitimate performance deficiencies. The consulate's policies and procedures impacting employment practices — often dictated by the sending state — could be scrutinized and challenged. Plaintiffs could seek discovery concerning individual consular officials who participate in the decision — and even government officials resident in the

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[15] *See Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 657 (1989) ("liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims").

[16] *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990) (discussing employer's burden to produce evidence describing its "legitimate business reasons" for the decisions impacting plaintiff).

sending state who review the decision — in an effort to attack the *bona fides* of the employment decision and to identify indicia of bias against a given individual or protected class.[17] In certain jurisdictions, statutory claims could provide for injunctive relief, and furnish a basis for seeking to compel the consulate to employ an individual against its wishes — even employees in highly sensitive positions.

Even absent any actionable conduct by a consulate, lawsuits will be filed and the foregoing inquiries will take place under the standard established by the court of appeals. This state of affairs poses a sweeping and serious affront to the sovereign rights of foreign states in the conduct of their consular affairs. Moreover, the impact of the lower court's decision is not limited to consulates. Employees of embassies and other diplomatic missions could, with justification, rely upon the court of appeals' decision in suing their employers under the "commercial activity" exception to the FSIA, thereby seriously compounding the mischief unleashed by the lower court's error.

This Court has never before found occasion to address the application of foreign sovereign immunity principles to the operation of a foreign consulate or embassy. Indeed, the court of appeals' decision stands alone in addressing employment

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[17] In order to defend their employment decisions in court, consular officials would be obliged to waive their immunity from testifying in "judicial or administrative proceedings" provided under Article 44 paragraph 3 of the Vienna Convention on Consular Relations. App. 156-57.

claims asserted against a consulate or embassy. Because that decision erroneously invites disruptive, invasive claims against foreign states, it has broad and immediate implications for the foreign diplomatic community within the United States — and, by reciprocation, for U.S. diplomatic and consular operations abroad.[18] Accordingly, petitioner urges this Court to accept review and provide guidance that is — unlike the lower court's decision — in keeping with the intent of the FSIA and its preservation of sovereign rights and immunities.

II. THE DECISION BELOW APPLIES AN OVERBROAD STANDARD FOR APPLICATION OF THE 'COMMERCIAL ACTIVITY' EXCEPTION TO A FOREIGN STATE'S EMPLOYMENT ACTIVITIES THAT IS INCONSISTENT WITH DECISIONS OF THE DISTRICT OF COLUMBIA CIRCUIT

Under the standard announced and applied by the court of appeals, consulates and embassies engage in "commercial activity" in employing all but a small minority of their employees. The lower court's standard — and the results it compels — stands in stark contrast to a line of cases in the District of Columbia Circuit addressing international organizations, each of which recognizes that a foreign

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[18] *See, e.g., Boos v. Barry*, 485 U.S. 312, 323-24 (1988) (recognizing the United State's national interest in protecting foreign diplomats in this country, so that, "in light of the concept of reciprocity that governs much of international law", similar protections will be accorded U.S. diplomats abroad).

sovereign acts in a manner that is "peculiarly sovereign" in employing the staff necessary to support the operations of its foreign posts.[19] Because the court of appeals' decision is the first to address these issues in the important context of employment by a consulate or embassy — and does so in a misleading way which obscures the sounder approach reflected in the District of Columbia Circuit — petitioner urges this Court to review and reverse.

The standard adopted by the court of appeals categorizes as "commercial activity" a foreign state's employment of any individual other than "diplomatic, civil service or military personnel". App. 109. Since Canada does not administer entrance examinations or provide "tenure" to its locally-engaged staff, none of them qualify as "civil servants" under the indefensibly restrictive use of that term adopted by the court below.[20] Further, only a small minority of consular

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[19] *Broadbent v. Organization of American States*, 628 F.2d 27 (D.C. Cir. 1980); *Tuck v. Pan American Health Org.*, 668 F.2d 547 (D.C. Cir. 1981); *Morgan v. International Bank for Reconstruction and Dev.*, 752 F. Supp. 492 (D.D.C. 1990).

[20] The court of appeals adopts, without comment or analysis, the narrow definition of "civil servant" used by the district court, including its use of competitive entrance examinations as a *sine qua non* of civil service. In fact, Holden was subject to a comprehensive regulatory scheme adopted by Canada's Department of Foreign Affairs and International Trade covering the terms and conditions of employment for locally-engaged staff employed at its consulates, embassies, and other posts world-wide. These regulations, issued by the Minister of Foreign Affairs pursuant to Canada's Financial Administration Act, effectively create a global civil service, administered via uniform policies and procedures. The fact that these

(footnote continued...)

staff would meet the criteria for "diplomatic personnel" identified by the court of appeals.[21] As a result, petitioner's employment of a large majority of its consular employees — including those employees who are engaged in such patently governmental functions as issuing passports and visas — would be "commercial" under the court of appeals' flawed analysis.

The broad affront to sovereign immunity posed by the court of appeals' approach — and the widespread opportunity for invasive employment litigation which it fosters — contrasts sharply with the sound analysis adopted by the District of Columbia Circuit. Commencing with *Broadbent*, the District of Columbia Circuit has repeatedly refused to apply the "commercial activity" exception to employment claims asserted by staff employees of international organizations, and has consistently recognized that "the employment by a foreign state or international organization of

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regulations did not require competitive entrance exams or furnish tenure should not preclude Holden from being viewed as a "civil servant" for sovereign immunity purposes. *See Broadbent*, 628 F.2d at 33-34.

[21] At no point in these proceedings has petitioner contended that Holden was employed as a "diplomat."

internal administrative personnel — civil servants — is not properly characterized as 'doing business.'" 628 F.2d at 33.[22]

The court of appeals made little attempt to distinguish *Broadbent* and its progeny from this case — relying on nothing more than a specious syllogism that hinges upon its unsound and unsupported definition of "civil servant." App. 110 fn 1. Indeed, since there is no indication that the plaintiffs in *Broadbent* would have met the Ninth Circuit's restrictive definition of "civil servant" (and there is no indication that they were "diplomats" or "military personnel") application of the court of appeals' standard to that case could well have yielded a finding that their employment by OAS was a "commercial activity" — directly contradicting the District of Columbia Circuit's conclusion.

As a member of the Consulate's internal administrative staff who was engaged to carry out activities recognized and

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[22] *Broadbent* addressed employment claims brought against an international organization which asserted "absolute immunity" under the International Organizations Immunities Act of 1945. 22 U.S.C. § 288a(b) (1979) ("IOIA"). The D.C. Circuit declined to decide the "difficult question" of whether the IOIA furnished absolute immunity, since plaintiffs' claims were barred under the narrower "restrictive immunity" theory embodied in the FSIA. *Broadbent*, 628 F.2d at 32-33. This question was recently decided in *Rendall-Speranza v. Nassim*, 932 F. Supp. 19, 23 (D.D.C. 1996) where the district court rejected an international organization's assertion of absolute immunity and concluded that "the FSIA applies to international organizations".

protected as "consular functions" by international treaty,[23] Holden's employment cannot accurately be characterized as 'doing business,' any more than the employment activities addressed in *Broadbent*. The court of appeals' determination to the contrary, — and the widespread, unwarranted intrusion into the protected sphere of sovereign activity it stands to produce — should not be permitted to stand.

III. THE DECISION BELOW PRESENTS AN OPPORTUNITY FOR THIS COURT TO BRING AN END TO THE CONFUSING AND CONFLICTING APPLICATIONS BY THE LOWER COURTS OF THE FSIA'S LEGISLATIVE HISTORY PERTAINING TO EMPLOYMENT ACTIVITIES.

This Court has previously noted the limited assistance rendered by the definition of "commercial activity" set forth in the FSIA. *Republic of Argentina v. Weltover*, 504 U.S. 607, 617 (1992) ("[t]his definition . . . leaves the critical term 'commercial' largely undefined . . ."). Doubtless in response to the unhelpful statutory definition, and further prompted by the sometimes daunting task of drawing a distinction between the "nature" and "purpose" of the relevant conduct, the lower courts have regularly invoked the FSIA's legislative history in

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[23] The San Francisco Consulate's efforts to foster and promote bilateral trade with the United States, as assisted and executed by Holden, plainly fall within the scope of "consular functions" as defined by the Vienna Convention. Vienna Convention on Consular Relations, *supra*, art. 5(b). App. 149.

applying the "commercial activity" exception — notwithstanding this Court's admonition that reliance upon a statute's legislative history in resolving issues of statutory interpretation is "hazardous at best." *Board of Education v. Mergens*, 496 U.S. 226, 242 (1990).

The hazards alluded to in *Mergens* are manifest here. As applied by the court of appeals, the FSIA's legislative history addressing foreign state employment activities obscures, rather than illuminates, the proper scope of the "commercial activity" exception. The relevant passages from the House Report accompanying the FSIA are quoted in the court of appeals' decision:

> Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.

H. Rep. No. 94-1487, 94th Cong., 2d Sess. 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6615.[24] App. 142. With no discussion or analysis, the court of appeals simply quotes the

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[24] The court of appeals also quoted a related passage from the House Report which states that "Activities such as a government's . . . employment or engagement of laborers, clerical staff or public relations or marketing agents . . . would be among those included within the definition [of commercial activity]." *Id.*

foregoing passage, modifies it,[25] and adopts it as its "standard" for applying the "commercial activity" exception to foreign state employment activities. In so doing, the lower court presents a striking example of the very practice condemned by Justice Scalia in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 622 (1991) (Scalia, J., concurring): using excerpts of the legislative history for the purpose of giving authoritative content to the meaning of statutory text. Indeed, in limiting its analysis to the question of whether Holden was employed by petitioner as a "civil servant" or a "diplomat", the court of appeals improperly "enforce[s] [a] princip[e] gleaned solely from the legislative history that has no statutory reference point." *Shannon v. United States*, 114 S. Ct. 2419, 2426 (1994), quoting *International Brotherhood of Elec. Workers, Local Union No. 474 v. N.L.R.B.*, 814 F.2d 697, 712 (D.C. Cir.

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[25] The court of appeals' standard makes no reference to the last clause of the House Report passage addressing employment of "American citizens or third country nationals", nor does the lower court refer to Holden's American citizenship at any point in its analysis. In deleting the citizenship factor from its standard, the Ninth Circuit apparently rejected Holden's argument, criticized by petitioner below, that the House Report language in effect created a *per se* rule, requiring that any employment by a foreign state of an American citizen or third country national must be deemed to be a "commercial activity." Petitioner does not quarrel with the lower court's rejection of the employee's citizenship as a factor in applying the "commercial activity" exception in the employment context. Rather, petitioner objects to the court's reliance upon a fixed and dubious standard which, as applied to the employment activities of a foreign consulate, results in the wholesale negation of legitimate sovereign immunity interests protected and preserved by the FSIA.

1987), while at the same time further muddling the conflicting case law addressing the legislative history.[26]

Application of the "commercial activity" exception in the employment arena can not properly hinge upon definitions of "civil servant" and "diplomat" — terms that are absent from the relevant portions of the statute. Rather, under *Weltover* and *Nelson*, the proper focus must remain upon the nature of the activities giving rise to the plaintiff's claims. By relying upon the restrictive standard it derives from the legislative history, the court of appeals fails to address that which was obvious to the D.C. Circuit in *Broadbent*: a foreign state's employment of administrative personnel to staff its posts in the United States can not accurately be characterized as "doing business." This striking misuse of legislative history under the guise of statutory interpretation furnishes an additional — equally compelling — reason for this Court to grant the petition.

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[26] For example, at least one court has relied upon the above-quoted excerpt in giving weight to the plaintiff/employee's citizenship. *Zveiter v. Brazilian Nat'l Superintendency*, 833 F. Supp. 1089, 1093 (S.D.N.Y.), *aff'd*, 841 F. Supp 111 (S.D.N.Y. 1993). Other courts have expressed reservations about this citizenship test, either by refraining from its use *Segni v. Commercial Office of Spain*, 835 F.2d 160, 165 n.7 (7th Cir. 1987), or by holding that a sovereign's employment of an American citizen qualifies as a "governmental activity". *Friedar v. Government of Israel*, 614 F. Supp. 395, 400 (S.D.N.Y. 1985).

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Canadian Consulate

No. ___

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

Canadian Consulate,
Petitioner,

v.

Arlene Holden,
Respondent.

On Petition for a Writ of Certiorari to the
Ninth Circuit Court of Appeals

APPENDICES TO THE PETITION

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UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Arlene Holden, Plaintiff-Appellee,

v.

Canadian Consulate and Does 1-30,
Defendants-Appellants.

Case No. 94-17130.

Argued and Submitted May 17, 1996.

Decided Aug. 9, 1996.

Former commercial officer brought wrongful termination action against foreign consulate, asserting various claims including age and sex discrimination. The United States District Court for the Northern District of California, Saundra Brown Armstrong, J., denied consulate's motion to dismiss complaint which was based on sovereign immunity provided under Foreign Sovereign Immunities Act (FSIA). Consulate appealed. The Court of Appeals, Leavy, Circuit Judge, held that consulate's employment of former commercial officer was commercial activity which fell within commercial activity exception to immunity otherwise provided by FSIA.

Affirmed.

[1] FEDERAL COURTS k776
170Bk776

Existence of subject matter jurisdiction under Foreign Sovereign Immunities Act (FSIA) is question of law which Court of Appeals reviews de novo. 28 U.S.C.A. § 1602.

[2] INTERNATIONAL LAW k10.31
221k10.31

Foreign Sovereign Immunities Act (FSIA) is sole basis for obtaining jurisdiction over foreign state and its agencies and instrumentalities. 28 U.S.C.A. § 1602.

[3] INTERNATIONAL LAW k10.33
221k10.33

Foreign sovereign engages in "commercial activity", for purposes of commercial activity exception to immunity otherwise provided by Foreign Sovereign Immunities Act (FSIA), when it exercises only those powers that can also be exercised by private citizens, versus those powers peculiar to sovereigns. 28 U.S.C.A. §§ 1603(d), 1605(a)(2).

See publication Words and Phrases for other judicial constructions and definitions.

[4] INTERNATIONAL LAW k10.33
221k10.33

Commercial activity exception to immunity otherwise provided to foreign states under Foreign Sovereign Immunities Act (FSIA) applies only where foreign sovereign acts in market in manner of private player. 28 U.S.C.A. §§ 1603(d), 1605(a)(2).

[5] INTERNATIONAL LAW k10.38
221k10.38

To fall within Foreign Sovereign Immunities Act's (FSIA) commercial activity exception to presumption of immunity, it is not enough for foreign state merely to have engaged in commercial activity; rather, statutory language requires that plaintiff's cause of action be based upon commercial activity in question. 28 U.S.C.A. §§ 1603(d), 1605(a)(2).

[6] INTERNATIONAL LAW k10.33
221k10.33

Foreign state's employment of diplomatic, civil service or military personnel is governmental activity subject to immunity provided under Foreign Sovereign Immunities Act (FSIA), but employment of other personnel is "commercial activity" falling within commercial activity exception to FSIA immunity. 28 U.S.C.A. §§ 1603(d), 1605(a)(2).

See publication Words and Phrases for other judicial constructions and definitions.

[7] INTERNATIONAL LAW k10.33
221k10.33

Commercial officer formerly employed by foreign consulate was not civil servant, for purposes of determining whether employment of commercial officer was commercial activity falling within exception to immunity otherwise provided by Foreign Sovereign Immunities Act (FSIA), where commercial officer did not compete for any examination prior to being hired, was not entitled to tenure, was not provided same benefits as foreign service officers and did not receive

any civil service protections from foreign state's government. 28 U.S.C.A. §§ 1603(d), 1605(a)(2).

[8] INTERNATIONAL LAW k10.33
221k10.33

Commercial officer formerly employed by foreign consulate was not part of consulate's diplomatic personnel, for purposes of determining whether employment of commercial officer was commercial activity falling within exception to immunity otherwise provided by Foreign Sovereign Immunities Act (FSIA), though commercial officer's job was to foster and promote trade between United States and foreign state, where commercial officer was not involved in any policy-making, did not engage in any lobbying activities or legislative work for foreign state and could not speak for foreign state government. 28 U.S.C.A. §§ 1603(d), 1605(a)(2).

[9] INTERNATIONAL LAW k10.33
221k10.33

Foreign consulate's employment of commercial officer was "commercial activity," such that it fell within commercial activity exception to immunity otherwise provided by Foreign Sovereign Immunities Act (FSIA), and therefore consulate was not entitled to immunity in commercial officer's wrongful termination action, as commercial officer's employment involved promotion of products from foreign state, and promotion of products was regularly done by private persons. 28 U.S.C.A. §§ 1603(d), 1605(a)(2).

See publication Words and Phrases for other judicial constructions and definitions.

***919** William J. Carroll, Heller, Ehrman, White & McAuliffe, San Francisco, California, for the defendant-appellant.

Patrice L. Goldman, Rudy, Exelrod, Zieff & True, San Francisco, California, for the plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California, Saundra Brown Armstrong, District Judge, Presiding. D.C. No. CV-93-04015-SBA.

Before: LEAVY, NELSON, and TASHIMA, Circuit Judges.

LEAVY, Circuit Judge:

Arlene Holden, a former commercial officer, sued the Canadian Consulate for wrongful termination alleging, among other claims, sex and age discrimination. The Consulate moved to dismiss Holden's complaint based on sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602. The district court denied the motion finding that Holden's claims were based on a commercial activity, an exception to sovereign immunity under 28 U.S.C. § 1605(a)(2). The Consulate interlocutorily appeals the district court's order. We have jurisdiction under the collateral order doctrine. *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 779 (9th Cir.1991). We affirm.

***920 I.** Background

In February 1993, the Canadian government closed its Consulate in San Francisco. As a result, the Consulate laid off numerous employees, including appellee Holden. Holden was a "Commercial Officer" within the Trade and Investment Section of the Canadian Consulate. She held the same position throughout her thirteen year tenure with the Consulate. Her job involved responding to inquiries from Canadian companies regarding information on prospective buyers, assistance in obtaining sales representation or wholesale distributors, provision of names or appointments with trade contacts and evaluations of the sales potential of a particular product. Holden also spent a significant amount of time at trade shows, promotions and seminars. Occasionally, Holden would respond to marketing inquiries from the Canadian government. She would simply relay information to the government, without any opinion or analysis.

In place of the Consulate, Canada opened a small satellite office staffed with only one commercial officer. A competition for that position was held between Holden and another commercial officer, Mark Ritchie. Ritchie, a man younger and less experienced than Holden, was selected for the job.

As a result, Holden filed a complaint in the Northern District of California against the Consulate alleging sex discrimination, age discrimination, violation of California public policy, breach of the implied contract to terminate only for cause and breach of the covenant of good faith and fair dealing. The Consulate moved to dismiss the complaint based

on sovereign immunity granted by the FSIA. The district court denied the motion and this interlocutory appeal resulted.

II. Discussion

[1] The existence of subject matter jurisdiction under the FSIA is a question of law which this court reviews de novo. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 706 (9th Cir.1992), *cert. denied*, 507 U.S. 1017, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993).

[2] The FSIA is the "sole basis" for obtaining jurisdiction over a foreign state and its agencies and instrumentalities. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 688, 102 L.Ed.2d 818 (1989). Under the FSIA, foreign states are presumed to be immune from the jurisdiction of United States courts unless one of the FSIA's exceptions applies. 28 U.S.C. § 1604. Under the "commercial activities" exception, a foreign state is not immune if the plaintiff's cause of action is based upon a commercial activity carried on by the foreign state. 28 U.S.C. § 1605(a)(2). The FSIA defines "commercial activity" as "a regular course of commercial conduct or a particular transaction or act." 28 U.S.C. § 1603(d). In determining the commercial character of an activity, the FSIA directs courts to examine the nature of the act or course of conduct, rather than the purpose. Id.

[3][4] The Supreme Court has developed some additional guidelines. A foreign sovereign engages in commercial activity when it exercises "only those powers that can also be exercised by private citizens," versus those

"powers peculiar to sovereigns." *Saudi Arabia v. Nelson*, 507 U.S. 349, 360, 113 S.Ct. 1471, 1479, 123 L.Ed.2d 47 (1993); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S.Ct. 2160, 2166, 119 L.Ed.2d 394 (1992). The commercial activity exception applies only where the sovereign acts "in the market in the manner of a private player." Weltover, 504 U.S. at 614, 112 S.Ct. at 2166.

[5] Further, it is not enough for the foreign state merely to have engaged in a commercial activity. Rather the statutory language requires that the plaintiff's cause of action be "based upon" the commercial activity in question. *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1463 (9th Cir.), *cert. denied*, — U.S. ——, 116 S.Ct. 187, 133 L.Ed.2d 124 (1995). A plaintiff's claim is "based upon" those activities that are elements of the claim that would entitle the plaintiff to relief. *Saudi Arabia*, 507 U.S. at 356-57, 113 S.Ct. at 1477.

The Consulate contends Holden's suit is based on Canada's decision to close its Consulate which resulted in the loss of Holden's job. Such decision was clearly a sovereign ***921** act. Holden, however, does not challenge the right of Canada to close its Consulate. Rather her suit is based on the fact that she was terminated and a younger man was not.

Given the FSIA's lack of a clear definition of "commercial activity," we turn to the statute's legislative history which provides a useful framework for analyzing the question. The FSIA's corresponding House Report states, "Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or

military personnel, but not the employment of American citizens or third country nationals by the Foreign state in the United States." H. Rep. No. 94-1487, 94th Cong., 2d Sess. at 16, reprinted at 1976 U.S.Code Cong. & Ad. News 6604, 6615. The report further states, "Activities such as a government's ... employment or engagement of laborers, clerical staff or public relations or marketing agents ... would be among those included within the definition [of commercial activity]." Id.

[6] We adopt the standard suggested by the legislative history, that is, employment of diplomatic, civil service or military personnel is governmental and the employment of other personnel is commercial. Because private parties cannot hire diplomatic, civil service or military personnel, such hiring is necessarily governmental.

The Seventh Circuit has already adopted the analytical framework suggested by the House Report. See *Segni v. Commercial Office of Spain*, 835 F.2d 160, 165 (7th Cir.1987). There, the Commercial Office in Spain hired Segni to "develop the marketing of Spanish wines in the midwest area of the United States." Id. at 162 (quotations omitted). After he was fired, Segni sued the Commercial Office for breach of contract. The court held that the commercial activity exception of the FSIA denied sovereign immunity to the Commercial Office. Id. at 165.

The court rejected the argument that the mere act of employing Segni was per se a commercial activity. Id. Instead, they examined the nature of Segni's employment

activities to determine if Segni was a civil servant or a diplomatic officer. They found that he was neither. Id. The court relied on the fact that Segni had no role in the creation of government policy or its administration. "There is no indication in the record that he was so supervised or monitored by the Commercial Office, or so privy to its political deliberations, as to be considered a part of the Spanish government, as a civil servant or diplomat would be." Id. "The hiring of a marketing agent is certainly an activity ... in which a private person could engage." Id.

A. Civil Servant

[7] The district court examined the nature of Holden's work to determine if she was a civil servant, and found that she was not. The district judge found that Holden did not compete for any examination prior to being hired, was not entitled to tenure, was not provided the same benefits as foreign service officers and did not receive any civil service protections from the Canadian government. We affirm the district court's finding that Holden was not a civil servant.

B. Diplomatic Personnel

[8] We must next decide if Holden was part of the Consulate's diplomatic personnel.[1] The Consulate argues that

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[1] The Consulate contends that because Holden was part of its "internal administrative staff," her employment was per se governmental. It relies on *Broadbent v. Organization of American States*, 628 F.2d 27 (D.C.Cir.1980) and its progeny for the proposition that employment of "internal administrative personnel" is never a commercial activity under

(footnote continued...)

unlike Segni, Holden was a full- time employee of the Canadian government who was closely monitored and supervised. It further contends that her job was to foster and promote trade and investment between the United States and Canada, in a wide variety of industries. In other words, she was assigned to promote trade solely for trade's sake, not for commercial gain as a private player would. It contends she was not merely a marketing agent and she never engaged in any actual sales.

***922** [9] Although Holden, unlike Segni, was a part of the Consulate's staff, her work was not that of a diplomat. As the district court found, Holden's activities were primarily promoting and marketing and she was not involved in any policy-making and was not privy to any governmental policy deliberations. She did not engage in any lobbying activity or legislative work for Canada, and she could not speak for the government. The Consulate concedes these points. Furthermore, as an American, she was not allowed in the Consulate unless in the company of a foreign service officer.

Her employment is more analogous to a marketing agent. Like Segni, who promoted all Spanish wine, not any particular brand, Holden promoted various Canadian products.

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the FSIA. Its reliance is misplaced. *Broadbent* characterizes "internal administrative personnel" as civil servants. *Broadbent*, 628 F.2d at 33. Thus, even under *Broadbent*, we still must determine if the Consulate employed Holden as part of its civil service or diplomatic personnel.

See *Segni*, 835 F.2d at 161. Although the Consulate argues that the purpose of her work was to promote trade solely for trade's sake, and not for commercial gain, we examine the nature of the act, and not the purpose behind it. 28 U.S.C. § 1603(d); *Segni*, 835 F.2d at 164 (court ignored the fact that the purpose of Segni's work was to execute Spain's policy to increase exports). The nature of Holden's work, promotion of products, is regularly done by private persons. As such, her employment was a commercial activity, and thus the Consulate is not entitled to sovereign immunity under the FSIA.

III. Conclusion

For the reasons stated above, we AFFIRM the district court's order denying the Canadian Consulate sovereign immunity because Holden's claims are based upon a commercial activity.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Arlene Holden, Plaintiff

v.

Canadian Consulate and Does 1-30,
Defendants

Case No. 93-4015 SBA.

ORDER, dated Jul. 25, 1994, Saundra Brown Armstrong, United States District Judge

Plaintiff Arlene Holden filed this wrongful discharge employment discrimination action against the defendant Canadian Consulate on November 9, 1993. Presently before the Court is defendant's motion to dismiss on the basis that, as a foreign sovereign, defendant is immune from this suit under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1603 *et seq.* Defendant also seeks to dismiss the age and sex discrimination claims brought under the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12920 *et seq.*, for failure to state a claim. After having read and considered the briefs submitted in connection with this motion, and being fully informed, the Court finds that defendants motion to dismiss for lack of subject matter jurisdiction should be taken under submission pending an

evidentiary hearing, and defendant's motion to dismiss plaintiff's FEHA claims should be granted.[1]

BACKGROUND

Plaintiff Arlene Holden became an employee in the San Francisco Office of the Canadian Consulate in February of 1980. Plaintiff was employed as a Commercial Officer.

In February of 1993, the government of Canada decided to close its Consulate General in San Francisco. Canada's government operations were consolidated into a single Consulate General located in Los Angeles. The San Francisco Consulate General was replaced by a smaller sub-office, referred to as the Canadian Consulate Trade Office/San Francisco. The closure of the San Francisco Consulate General resulted in the termination of employment of twenty locally-engaged employees.

Only one Commercial Officer was to be retained for the smaller sub-office. A competition was held for the new Commercial Officer position between the two Commercial Officers from the San Francisco Consulate — plaintiff and Mark Ritchie. After the competition took place, defendant hired Mark Ritchie for the position.

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[1] The Court considers adjudication of the instant motion suitable without oral argument. *See* N. Dist. Local Rule 220-1.

DISCUSSION

A. Jurisdiction Pursuant to the Foreign Sovereign Immunity Act (FSIA)

The jurisdictional basis for plaintiff's action against defendant is provided under the FSIA, which is the only source of subject matter jurisdiction over foreign sovereigns in the courts of the United States. *Security Pacific National Bank v. Derderian*, 872 F.2d 281, 284 (9th Cir. 1989). Under the FSIA, a foreign-state[2] is immune from the jurisdiction of the United States courts unless certain enumerated exceptions apply. 28 U.S.C. § 1604. Once defendant presents a prima facie case that it is a foreign sovereign, plaintiff has the burden of providing evidence to show that, under the exceptions to the FSIA, immunity should not be granted. *Cargill Intern. S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2nd Cir. 1993); *Joseph*, 830 F.2d at 1021. However, the ultimate burden of persuasion remains with the alleged foreign sovereign. *Id.*

Plaintiff contends that defendant is not immune because defendant's hiring of plaintiff falls under the "commercial activity" exception set forth in 28 U.S.C. § 1605(a)(2), which "limits immunity to the noncommercial activities of a foreign sovereign." *In re Greene*, 980 F.2d 590, 599 (9th Cir. 1992). "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28

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[2] A consulate constitutes a "foreign state" under the FSIA. *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987).

U.S.C. § 1603(d). Thus, the jurisdictional issue depends on the nature and the scope of plaintiff's employment. *See Segni v. Commercial Office of Spain*, 835 F.2d 160 (7th Cir. 1987).

In *Segni*, plaintiff, a citizen of Argentina, was hired to work in the Commercial Office of Spain. Plaintiff was employed to promote the foreign sale of Spanish wine, which was a significant component of that country's export business. The Court found that though the purpose of plaintiff's activities was to increase Spanish exports and thereby reduce unemployment in Spain, the nature of plaintiff's work was to market specific products. The court found that plaintiff was engaged in commercial, rather than public or governmental, activities:

> An examination of the nature of his activities indicates that he cannot be considered either as a civil servant or a diplomatic officer. He had no role in the creation of the government policy or its administration; rather, he simply carried it out. There is no indication in the record that he was so supervised or monitored by the Commercial Office, or so privy to its political deliberations, as to be considered a part of the Spanish government, as a civil servant or diplomat would be.

Segni, 835 F.2d at 165.

Plaintiff maintains that her primary duty at the Canadian Consulate was to assist Canadian businesses in marketing and promoting their wares in northern California. (Decl. of Arlene Holden in Supp. of Pl.'s Opp'n to Def.'s Mot. to Dismiss ¶ 10). She also contends that she "conceived and executed sales and

promotional presentations for Canadian companies" and "promoted and furthered the sales of Canadian goods" and acted as a liaison between Canadian manufacturers and American buyers. (*Id.* at 11).[3]

Defendant contends, however, that plaintiff's job description as a Commercial Officer included activities such as "collaboration on policy formulation pertaining to Canada's export policy and export goals," "furnishing proposals and advice on trade objective and activities," "establishing goals designed to protect and expand Canadian exports" and "lobbying municipal and state governments for removal of any barriers which hinder Canadian exports." (Decl. of K. David McNamara in Supp. of Def.'s Mot. to Dismiss ¶¶ 17, 18, Ex. C).

While she concedes that these activities were part of her job description, plaintiff contends she never collaborated on policy formulation pertaining to Canada's export policy, lobbied any government, or consulted with Canadian officials regarding policy statements. (Decl. of Arlene Holden in Supp. of Pl.'s Opp'n to Def.'s Mot. to Dismiss ¶ 6). Plaintiff insists that her employment involved implementing and developing promotional and marketing programs to expand Canadian exports in Northern California. (*Id.*)

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[3] Plaintiff also contends that she was never referred to as a civil servant while working at the Canadian Consulate. Given that the Court must consider the *nature* of plaintiff's employment activities, the relevance of this point is not readily apparent.

In its reply, defendant contends that plaintiff has provided an "unduly narrow and, at times, misleading" description of her activities. (Reply Mem. of P & A in Supp. of Def.'s Mot. to Dismiss at 7). Defendant contends that "the Canadian government relied upon Ms. Holden, as it relies upon other Commercial Officers, to identify emerging opportunities for and potential barriers to Canadian exports ... and to make recommendations for appropriate strategies." (Suppl. Decl. of K. David McNamara in Supp. of Def.'s Mot. to Dismiss ¶ 2). Mr. McNamara insists that the crucial aspect of the responsibilities of Commercial Officers like Ms. Holden is to "assist in setting priorities and otherwise shaping Canadian export policy ...." (*Id.*)[4]

Based upon the evidence currently before the Court, there is a disputed issue of fact as to the nature and scope of plaintiff's activities with the Canadian Consulate. In determining whether subject matter jurisdiction exists, the court may base its decision on the complaint supplemented by the undisputed facts and the court's resolution of the disputed facts. *MCG, Inc. v. Great Western Energy Corp.*, 896 F.2d 170, 178 (5th Cir. 1990). When the facts regarding jurisdiction are disputed by the parties, the Court has the discretion to defer the motion to trial or to hold an evidentiary hearing on the issue. *Commodities Export Co. v. U.S. Customs Svc.*, 888 F.2d 431 (6th Cir. 1989).

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[4] Moreover, defendant contends that though plaintiff maintains that she never registered with the United States Department of Justice as a foreign agent of the Canadian government (Decl. of Arlene Holden ¶ 4), she was required to do so. (Suppl. Decl. of K. David McNamara ¶ 3).

Accordingly, the Court will take defendant's motion to dismiss for lack of jurisdiction under submission pending an evidentiary hearing. The hearing will address the sole issue of the nature and scope of plaintiff's activities and responsibilities while employed by the Canadian Consulate.[5]

B. Plaintiff's Claims Pursuant to the California Fair Employment and Housing Act (FEHA)

In construing a statute, the Court must first look to the language of the statute and ascribe to it the plain meaning of its terms. *Rojo v. Kilger*, 52 Cal.3d 65, 73 (1990). If the language is clear and unambiguous there is no need for statutory construction, nor is it necessary to resort to indicia of

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[5] Plaintiff suggests that her American citizenship is determinative in evaluating whether her employment involved commercial or governmental activities. Plaintiff cites to the report on the FSIA by the Committee on the Judiciary of the House of Representatives of the 94th Congress, which provides in part that governmental activities do not include "the employment of American citizens or third country nationals by the foreign state in the United States." (H.Rep. No. 94-1487, 94th Cong., 2d Sess. 16 (1976), U.S. Code Cong. & Admin.News 1976, at 6614).

No court has determined what weight this factor should be given in examining whether an activity is commercial in nature. *See Segni*, 835 F.2d at 165 n.7. However, it is evident that, contrary to defendant's unsupported position, the Court must consider this factor to some degree. *Id.*; *Broadbent v. Organization of American States*, 628 F.2d 27, 34 (D.C. Cir. 1980), *Zveiter v. Brazilian National Superintendency*, 833 F.Supp. 1089, 1093 (S.D.N.Y. 1993). However, the Court will not reach the issue concerning the proper weight to be given to plaintiff's Citizenship until after the evidentiary hearing.

the intent of the Legislature. *Lungren v. Deukmejian*, 45 Cal.3d 727, 735 (1988). However, literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. *Id.*

The FEHA defines an "employer" as including

> any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the state or any political or civil subdivision thereof and cities ....

Govt. Code § 12926(d).

The FEHA defines a "person" as including

> one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries.

Govt. Code § 12925(d).

Defendant maintains that the Canadian Consulate, as a governmental entity, is not an "employer" as defined under the FEHA because 1) it is not a "person" within the meaning of the FEHA, and 2) a foreign government was not listed along with the state as a governmental entity that is considered to be an "employer."

The FEHA definition of "person" does not include and cannot reasonably be read as encompassing foreign governments or the instrumentalities of foreign governments. Moreover, the FEHA definition of "employer" is limited to

persons employing five or sore employees or the state government and its subdivisions. There is no mention of governments from other states, the federal government, or foreign governments.

When read together, the definitions of "person" and "employer" in the FEHA do not include governments other than the California state government. To interpret the definition of "person" to include governments would render that portion of the Definition of "employer" concerning "the state or any political or civil subdivision thereof and cities" superfluous. A basic tenet of statutory construction provides that any construction of a statute which would render words or phrases surplusage should be avoided. *In re Co Petro Marketing Group, Inc.*, 680 F.2d 566 (9th Cir. 1982). Thus, while the definition of "employer" encompasses the California state government and its subdivisions, the FEHA does not cover other governments, including foreign governments.

Plaintiff contends that the California FEHA should be interpreted to include foreign governments. However, plaintiff has failed to address the statutory language of the FEHA or its definitions of "employer" and "person." While plaintiff insists, pursuant to California Government Code section 12993(a), that this Court interpret the FEHA liberally, plaintiff does not suggest how the relevant statutory definitions are amenable to the result plaintiff advocates. Plaintiff fails to identify any ambiguity in the statutory language, or any word or phrase that could reasonably be interpreted as including foreign consulates within its purview.

Rather than addressing the language of the statute, plaintiff contends that the Court must look to the statutory purpose of the FEHA by examining the statutory purpose and case authority concerning various federal anti-discrimination statutes, including Title VII and the Age Discrimination in Employment Act. However, plaintiff does not cite to any authority for the proposition that the general purpose of federal anti-discrimination statutes and the California FEHA are identical or closely analogous. Rather, plaintiffs' case authority merely stands for the proposition that California Courts will rely upon federal law to interpret provisions of the FEHA that are analogous to the federal Civil Rights Act. *Cook v. Lindsay Olive Growers*, 911 F.2d 233, 241 (9th Cir. 1990).

In this case, the federal statutes cited by plaintiff do not have definitions of "person" and "employer" that are analogous to the definitions provided in the FEHA. The federal anti-discrimination statutes referenced by plaintiff include significantly broader definitions of "person" and employer" that encompass governments[6] Where federal

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[6] For example, Title VII defines "person" as

> one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, United States Code, or receivers.

42 U.S.C. § 20003(a).

The Age Discrimination in Employment Act defines "person" as

(footnote continued...)

anti-discrimination statutes and the California FEHA are not similar, the California Supreme Court has cautioned against analogizing federal statutes to the FEHA, noting that the differences between [federal] laws and the FEHA diminish the weight of federal precedents." *Commodore Home Systems, Inc. v. Superior Court*, 32 Cal.3d 211 (1982). Thus, plaintiff's authority is inapposite.

Moreover, the relevant legislative intent behind the California FEHA, as identified by the California Supreme Court, is to "protect and safeguard the civil rights of all individuals to seek, have access to, obtain, and hold employment without discrimination because of ... sex, and age for individuals over forty years of age." 2 Cal. Admin. Code § 7286.3; *Brown v. Superior Court*, 37 Cal.3d 477, 485-86 (1984). There is no suggestion from this statement that the legislature intended to expand the definition of "employer" and "person" beyond that expressly provided in the statute to include any governmental agency or entity other than California governmental agencies. In fact, plaintiff has forward no evidence that the legislature intended the federal government, other state governments, or foreign governments to come under the scope of the FEHA.

Plaintiff also contends that a provision of the FSIA, when read in conjunction with the FEHA, provides for liability

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one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives or any organized group of persons.

29 U.S.C. § 630(a).

under the FEHA. 28 U.S.C. § 1606 provides in part that when a sovereign is not immune, it is "liable in the same manner and to the same extent as a private individual under like circumstances ...." Plaintiff maintains that because defendant does not enjoy sovereign immunity, it is liable to the same extent as a private individual. As private individuals are "persons" under the FEHA, concludes plaintiff, defendant is similarly liable.

However, "[t]he language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state ...." *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1982). In fact, Section 1606, which is entitled "Extent of Liability" pertains to damages, not liability. *Walpex Trading v. Yacimientos Petroliferos*, 789 F.Supp. 1268, 1275-78 (S.D.N.Y. 1992). This position is "buttressed by the structure of section 1606, which discusses liability for punitive, actual and compensatory damages." *Id.* Thus, plaintiff's contention is precluded by the relevant case authority.

Accordingly, given that the statutory definitions of "employer" and "person" cannot be read to include foreign governmental agencies, as well as plaintiff's failure to identify any legislative intent to include foreign governments within the purview of the FEHA, defendant cannot be held liable under the FEHA. Defendant's motion to dismiss concerning plaintiff's FEHA claim is therefore granted. Accordingly,

IT IS HEREBY ORDERED THAT:

1. Defendant's motion to dismiss for lack of subject matter jurisdiction is taken under submission.

2. An evidentiary hearing shall take place on September 8, 1994, at 1:00 p.m. in Courtroom 2. The hearing shall address the issue of the nature and scope of plaintiff's activities at the Canadian Consulate.

3. Defendant's motion to dismiss plaintiff's FEHA claims for failure to state a claim is GRANTED.

IT IS SO ORDERED

DATED: July __, 1994

SAUNDRA BROWN ARMSTRONG
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Arlene Holden, Plaintiff

v.

Canadian Consulate and Does 1-30, Defendant

Case No. 93-4015 SBA.

FINDINGS OF FACT AND CONCLUSIONS OF LAW; ORDER DENYING MOTION TO DISMISS NON-FEHA CLAIMS, dated Nov. 1, 1994, Sandra Brown Armstrong, United States District Court Judge

Plaintiff Arlene Holden filed a wrongful discharge/discrimination action following her lay-off by defendant Canadian Consulate, alleging that defendant's termination of her employment discriminated against her on the basis of her age and sex, and was in breach of a contract of employment between plaintiff and defendant. By an order filed July 25, 1994, this Court dismissed plaintiff's age and sex discrimination claims brought under the California Fair Employment and Housing Act ("FEHA"), Cal. Govt. Code § 12920 *et seq.* (Order at 12 (filed July 25, 1994) [hereinafter "Order of 7/25/94"].) Presently before the court is defendant's motion to dismiss plaintiff's non-FEHA claims on the basis that, as a foreign sovereign, defendant is immune from suit under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1603 *et seq.*

By its order of 7/25/94, the Court requested additional evidence pertaining to the nature and scope of plaintiff's activities and responsibilities while employed by defendant. An evidentiary hearing was held on September 8 and 9, 1994. Based upon the evidence taken at the hearing, as well as the pre-hearing and post-hearing papers filed by the parties, the Court's Findings of Fact and Conclusions of Law are detailed below. As an initial matter, this Court deems any finding of fact that is more properly considered a conclusion of law to be a conclusion of law. Additionally, the Court deems any conclusion of law that is more properly considered a finding of fact to be a finding of fact.

FINDINGS OF FACT

1. Plaintiff is an United States citizen.

2. Defendant is a foreign state under the FSIA.

3. Plaintiff was employed by defendant between February 1980 and March 31, 1993. Plaintiff's position was referred to as Commercial Officer. As a Commercial Officer, plaintiff reported directly to the Senior Trade Commissioner. The person fulfilling the role of Senior Trade Commissioner rotated every three or four years.

4. In 1956, plaintiff graduated from Cornell University with a B.S. from the College of Home Economics. Prior to becoming employed by defendant, plaintiff was employed by the British Consulate as a Commercial Officer for less than one year, by the New Zealand Consulate as a marketing officer for less than one year, and in the preceding years by Eastman Chemical Products, Inc., Monet Jewelers, and a fabric house in

New Jersey. Plaintiff's employment with private companies involved matters having to do with sales, promotion and marketing of apparel and home furnishings, and related industries.

5. At the time of plaintiff's hire, defendant sought Commercial Officers who were experts in local marketing and business.

6. When defendant sought individuals to compete for plaintiff's Commercial Officer position in March 1993, it sought employees of the defendant with at least four years of marketing or trade promotion experience.

7. In February 1993, the Canadian government decided to close its Consulate General in San Francisco. The Canadian government consolidated its operations into a single Consulate General located in Los Angeles. The San Francisco Consulate General was replaced by a smaller sub-office, referred to as the Canadian Consulate Trade Office/San Francisco. The closure of the San Francisco Consulate General resulted in the termination of employment of 20 locally engaged employees, including plaintiff.

8. Only one Commercial Officer was to be retained for the smaller sub-office. A competition was held for the new Commercial Officer position between the two Commercial Officers from the San Francisco Consulate — plaintiff and Mark Ritchie. After the competition took place, defendant hired Mark Ritchie for the position. Plaintiff was laid off and received severance pay of about $69,000.00.

9. The San Francisco Consulate, like other consulates and embassies operated by Canada in the United States and elsewhere, relied heavily upon the use of locally engaged staff, who are typically citizens of the country within which the post is situated. In the San Francisco Consulate, 23 of the 28 officers who staffed it at the time it was closed were locally-engaged staff.

10. Defendant employed plaintiff in the capacity of locally-engaged staff. As a United States citizen, plaintiff could not be employed in any capacity other than that of locally-engaged staff.

11. Defendant preferred to use locally-engaged staff for certain positions because such individuals would have local knowledge in terms of manner of doing business, contacts, and culture. Such individuals also would provide institutional memory since Canadian foreign service officers are rotated every three or four years. Finally, defendant has determined that it is more cost effective to employ locally engaged staff.

12. Defendant treats locally-engaged staff in a manner different from that in which it treats foreign service employees: different regulations apply to locally-engaged staff than to foreign service employees; locally-engaged staff are entitled to overtime; locally-engaged staff do not receive any housing assistance or any private schooling for their children from the Canadian government; locally-engaged staff are not permitted in the Consulate without the presence of a foreign service officer.

13. Plaintiff was not employed by defendant in the capacity as a civil servant. She did not compete for any examination prior to obtaining her position with defendant. She was not entitled to tenure in her position. She was not provided with the same benefits as that provided foreign service officers. She did not receive any civil service protections from the Canadian government. Defendant never required her to register as a foreign agent. Further, as discussed below, she performed commercial and private activities, not noncommercial and governmental activities, for defendant.

14. Plaintiff's activities while employed by defendant were commercial and private activities. As a Commercial Officer, plaintiff was primarily engaged in promoting and in marketing. She was not involved in policy-making for defendant. She was not privy to any governmental policy deliberations. She did not engage in lobbying activity or legislative work for the government.

15. As a Commercial Officer, plaintiff's activities involved responding to inquiries from Canadian companies in the areas of medical products, building products, and consumer products, including home furnishings, food, apparel. Such inquiries included requests for information on prospective buyers, assistance in obtaining sales representation or wholesale distributors, provision of names or appointments with trade contacts in plaintiff's geographical territory, and/or critiques and/or evaluations of the sales potential of a particular product. Plaintiff also spent a great deal of her time participating in trade shows, promotions, and seminars. A very small portion of plaintiff's time was involved in

responding to governmental marketing inquiries. Such inquiries required that plaintiff search for information and relay the information she found to the Canadian government. When she relayed the information, she did not include any opinion or analysis.

16. Defendant's job description for its Commercial Officers, including its job description for plaintiff, did not mirror the activities in which plaintiff was actually engaged. The job description, in and of itself, is a broad characterization of plaintiff's work and provided little guidance in determining the activities plaintiff actually performed. The Court specifically finds plaintiff's testimony with regard to her employment activities to be more credible than any other testimony and evidence provided by the parties.

CONCLUSIONS OF LAW

1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1330(a) and the FSIA. The jurisdictional basis for plaintiff's action against defendant is provided under the FSIA, which is the only source of subject matter jurisdiction over foreign sovereigns in the courts of the United States. *Security Pacific National Bank v. Derderian*, 872 F.2d 281, 284 (9th Cir. 1989).

2. Under the FSIA, a foreign state is immune from the jurisdiction of the United States courts unless certain enumerated exceptions apply. 28 U.S.C. § 1604. Once defendant presents a prima facie case that it is a foreign sovereign, plaintiff has the burden of providing evidence to show that, under the exceptions to the FSIA, immunity should

not be granted. *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2nd Cir. 1993); *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987). The ultimate burden of persuasion, however, remains with the alleged foreign sovereign. *Id.*

3. A consulate constitutes a foreign state under the FSIA. *Joseph*, 830 F.2d at 1021. As defendant is a consulate, it is a foreign state, and therefore plaintiff must produce evidence that an exception to the FSIA exists. Plaintiff contends that defendant is not immune because defendant's hiring of plaintiff falls under the "commercial activity" exception set forth in 28 U.S.C. § 1605(a)(2).

4. The commercial activity exception "limits immunity to the noncommercial activities of a foreign sovereign." *In re Greene*, 980 F.2d 590, 599 (9th Cir. 1992). In determining whether the commercial activity exception applies, the FSIA directs courts to evaluate the nature rather than the purpose of the activity in question. *Joseph*, 830 F.2d at 1023. Specifically, the FSIA provides: "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). Nevertheless, the purpose of an act may be relevant in defining its nature, as the essence of an act is often defined by its purpose. *Joseph*, 830 F.2d at 1023. Thus, the jurisdictional issue in the instant action depends on the nature of plaintiff's employment activities. *See Segni v. Commercial Office of Spain*, 835 F.2d 160, 165 (7th Cir. 1987). The Court must decide whether the nature of plaintiff's employment activities were governmental or private. *Segni*, 835 F.2d at 165; *Joseph*,

830 F.2d at 1024. If her employment activities were governmental, then immunity shields defendant from suit. *Joseph*, 830 F.2d at 1024. If, however, the activities were private, then the commercial activity exception applies and this suit against defendant may proceed. *Id.* For the purposes of the commercial activity exception under FSIA, activities are governmental when they can only be performed by a sovereign state; they are private when they might be performed by a private actor. *Joseph*, 830 F.2d at 1024. As stated by the Ninth Circuit in *Joseph*: "Transactions between strictly governmental entities and commercial enterprises are covered by the commercial activity exception if the role of the sovereign is one which might be played by a private actor. An activity is public and 'noncommercial' if it is one which only a sovereign state can perform." 830 F.2d at 1024 (citations omitted).

5. Defendant argues that the inquiry under the commercial activity exception should focus on whether plaintiff was a civil servant, not on the nature of her employment activities. To the extent that defendant would have this Court not explore the nature of plaintiff's employment activities, the Court declines to adopt defendant's suggested approach. The House Report regarding FSIA's commercial activity exception comments in pertinent part as follows:

> Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.

H.Rep. No. 94-1487, 94th Cong., 2d Sess. 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6614-15. Under this comment, if the employee is a civil servant, then the foreign state's employment of that employee is a governmental activity, as long as the employee is not a United States citizen or third country national. Because the plaintiff here is a United States citizen, the House Report comment regarding employment of civil service personnel is not applicable. Thus, even under the House Report comment, the Court finds that the proper focus is on the nature of plaintiff's employment activities.

6. Before embarking on its discussion of plaintiff's employment activities, the Court addresses plaintiff's argument that defendant's employment of plaintiff constitutes a commercial activity because plaintiff is a United States citizen. Plaintiff bases this argument on the above-quoted House Report comment. The Court recognizes that the House Report comment specifically exempts the employment of United States citizens from its statement that the employment of certain groups of individuals constitutes a noncommercial activity. The Court, however, is not necessarily persuaded that it is appropriate to interpret the House Report comment as specifying that the employment of United States citizens constitutes a commercial act, regardless of the nature of the particular citizen's employment activities. The Court need not reach this issue, because, as discussed below, it finds that the nature of plaintiff's employment were private and commercial, and therefore the commercial activity exception allows plaintiffs suit against defendant to go forward.

7. In *Segni*, the Seventh Circuit found that the employment of Enrique Segni ("Segni") was a commercial activity because the nature of his employment activities were private, not governmental, in character:

> We must also examine the nature of Segni's "employment activities" in order to determine whether they are governmental or private. An examination of the nature of his activities indicates that he cannot be considered either as a civil servant or a diplomatic officer. He had no role in the creation of the government policy or its administration; rather, he simply carried it out. There is no indication in the record that he was so supervised or monitored by the Commercial Office, or so privy to its political deliberations, as to be considered a party of the Spanish government, as a civil servant or diplomat would be.

835 F.2d at 165. Thus, the Seventh Circuit concluded that the commercial activity exception applied to allow Segni's suit to proceed. *Id.*

8. This Court finds the *Segni* rationale to be persuasive, and, under that rationale, holds that plaintiff's employment activities were private and commercial in nature. As in *Segni*, the plaintiff here was not involved in policy-making for defendant. Plaintiff was involved in gathering promotional and marketing information for defendant. While the information plaintiff gathered for defendant may have been used for the purposes of policy-making, plaintiff was not privy to the political deliberations which occurred in making that

policy. Moreover, when plaintiff relayed the information to defendant, she did not provide any opinion or analysis that might have made her part of the political deliberation process. Further, plaintiff did not engage in any lobbying activity or legislative work on behalf of defendant in either the United States or Canada. Given the foregoing, plaintiff's employment by defendant is best described as a contract under which she provided marketing services to defendant. As the hiring of a marketing agent is certainly an activity in which a private person could engage, *Segni*, 835 F.2d at 165, defendant is not entitled to immunity under FSIA.

9. Supporting this Court's conclusion that plaintiff was not engaged in policy-making and was not privy to the political deliberations involved in policy-making is the fact that defendant did not treat plaintiff as a civil servant. Defendant did not require plaintiff to compete for any examination prior to hiring her. It did not give her tenure. Neither it nor the Canadian government provided her with any civil servant protections. It did not require her to register as a foreign agent.

10. The commercial activity exception under FSIA applies to the case at bar, and therefore defendant is not immune from suit. Plaintiff's action therefore may go forward.

ORDER

Pursuant to the above Findings of Fact and Conclusion of Law, this Court DENIES defendant's motion to dismiss plaintiff's non-FEHA claims. Further, the Court hereby LIFTS the stay on the parties' compliance with General Order 34 and the Court's Order Re Court Procedures, and consequently

SETS a status conference in this case for December 1, 1994 at 3:45 p.m. in Courtroom 3. All parties shall file, jointly if possible, a Status Conference Statement no later than ten (10) days prior to the conference date. Failure to comply with this Court's directives in connection with the status conference may result in sanctions, including dismissal or entry of default judgment.

IT IS SO ORDERED.

DATED: October __, 1994

SAUNDRA BROWN ARMSTRONG

United States District Judge

Excerpts From The Foreign Sovereign Immunities Act of 1976: §§1330, 1602, 1603, 1604, 1605

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and

litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

LEGISLATIVE HISTORY OF
28 U.S.C. §§1602, 1603, 1604, 1605

Section 1603. Definitions

(d) Commercial activity.— Paragraph (c) of section 1603 defines the term 'commercial activity' as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A 'regular course of commercial conduct' includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a 'particular transaction or act.'

As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.

By contrast, a foreign state's mere participation in a foreign assistance program administered by the Agency for International Development (AID) is an activity whose essential nature is public or governmental, and it would not

itself constitute a commercial activity. By the same token, a foreign state's activities in and 'contacts' with the United States resulting from or necessitated by participation in such a program would not in themselves constitute a sufficient commercial nexus with the United States so as to give rise to jurisdiction (see sec. 1330) or to assets which could be subjected to attachment or execution with respect to unrelated commercial transactions (see sec. 1610(b)). However, a transaction to obtain goods or services from private parties would not lose its otherwise commercial character because it was entered into in connection with an AID program. Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.

The courts would have a great deal of latitude in determining what is a 'commercial activity' for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable. Activities such as a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.

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REF-NO: UNTS: 596 UNTS 261 TIAS: TIAS 6820 UST: 21 UST 77

TITLE: MULTILATERAL

Vienna Convention on Consular Relations and Optional Protocol on Disputes

Done at Vienna April 24, 1963; Ratification advised by the Senate of the United States of America October 22, 1969; Ratified by the President of the United States of America November 12, 1969; Ratification of the United States of America deposited with the Secretary-General of the United Nations November 24, 1969; Proclaimed by the President of the United States of America January 29, 1970; Entered into force with respect to the United States of America December 24, 1969.

DATE: SIGNED April 24, 1963 IN_FORCE March 19, 1967

LENGTH: 14525 words

TEXT:

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS the Vienna Convention on Consular Relations and the Optional Protocol Concerning the Compulsory Settlement of Disputes were signed at Vienna on April 24, 1963;

WHEREAS the texts of the Convention and Protocol, as certified for the Secretary-General of the United Nations, are word for word as follows:

UNITED NATIONS CONFERENCE ON CONSULAR RELATIONS

VIENNA CONVENTION ON CONSULAR RELATIONS

UNITED NATIONS 1964

The States Parties to the present Convention,

Recalling that consular relations have been established between peoples since ancient times,

Having in mind the Purposes and Principles of the Charter of the United Nations

FOOTNOTE: TS 993; 59 Stat. 1031. concerning the sovereign equality of States, the maintenance of international

peace and security, and the promotion of friendly relations among nations,

Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,

FOOTNOTE: 500 UNTS 95.

Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

Article 1 Definitions

1. For the purposes of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

(a) "consular post" means any consulate-general, consulate, vice-consulate or consular agency;

(b) "consular district" means the area assigned to a consular post for the exercise of consular functions;

(c) "head of consular post" means the person charged with the duty of acting in that capacity;

(d) "consular officer" means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions;

(e) "consular employee" means any person employed in the administrative or technical service of a consular post;

(f) "member of the service staff" means any person employed in the domestic service of a consular post;

(g) "members of the consular post" means consular officers, consular employees and members of the service staff;

(h) "members of the consular staff" means consular officers, other than the head of a consular post, consular employees and members of the service staff;

(i) "member of the private staff" means a person who is employed exclusively in the private service of a member of the consular post;

(j) "consular premises" means the buildings or parts of buildings and the land ancillary thereto, irrespective of

ownership, used exclusively for the purposes of the consular post;

(k) "consular archives" includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping.

2. Consular officers are of two categories, namely career consular officers and honorary consular officers. The provisions of Chapter II of the present Convention apply to consular posts headed by career consular officers; the provisions of Chapter III govern consular posts headed by honorary consular officers.

3. The particular status of members of the consular posts who are nationals or permanent residents of the receiving State is governed by Article 71 of the present Convention.

CHAPTER I. CONSULAR RELATIONS IN GENERAL
SECTION I. ESTABLISHMENT AND CONDUCT OF CONSULAR RELATIONS

Article 2 Establishment of consular relations

1. The establishment of consular relations between States takes place by mutual consent.

2. The consent given to the establishment of diplomatic relations between two States implies, unless otherwise stated, consent to the establishment of consular relations.

3. The severance of diplomatic relations shall not ipso facto involve the severance of consular relations.

Article 3 Exercise of consular functions

Consular functions are exercised by consular posts; They are also exercised by diplomatic missions in accordance with the provisions of the present Convention.

Article 4 Establishment of a consular post

1. A consular post may be established in the territory of the receiving State only with that State's consent.

2. The seat of the consular post, its classification and the consular district shall be established by the sending State and shall be subject to the approval of the receiving State.

3. Subsequent changes in the seat of the consular post, its classification or the consular district may be made by the sending State only with the consent of the receiving State.

4. The consent of the receiving State shall also be required if a consulate-general or a consulate desires to open a vice-consulate or a consular agency in a locality other than that in which it is itself established.

5. The prior express consent of the receiving State shall also be required for the opening of an office forming part of an existing consular post elsewhere than at the seat thereof.

Article 5 Consular functions

Consular functions consist in:

(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

(b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;

(c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;

(d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;

(e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;

(f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;

(g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession mortis causa in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;

(h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;

(i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;

(j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;

(k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect

of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;

(l) extending assistance to vessels and aircraft mentioned in sub-paragraph (k) of this Article and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending State;

(m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

CHAPTER II. FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO CONSULAR POSTS, CAREER CONSULAR OFFICERS AND OTHER MEMBERS OF A CONSULAR POST

SECTION I. FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO A CONSULAR POST

Article 28 Facilities for the work of the consular post

The receiving State shall accord full facilities for the performance of the functions of the consular post.

Article 29 Use of national flag and coat-of-arms

1. The sending State shall have the right to the use of its national flag and coat-of-arms in the receiving State in accordance with the provisions of this Article.

2. The national flag of the sending State may be flown and its coat-of-arms displayed on the building occupied by the consular post and at the entrance door thereof, on the residence of the head of the consular post and on his means of transport when used on official business.

3. In the exercise of the right accorded by this Article regard shall be had to the laws, regulations and usages of the receiving State.

Article 30 Accommodation

1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws and regulations, by the sending State of premises necessary for its consular post or

assist the latter in obtaining accommodation in some other way.

2. It shall also, where necessary, assist the consular post in obtaining suitable accommodation for its members.

Article 31 Inviolability of the consular premises

1. Consular premises shall be inviolable to the extent provided in this Article.

2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of a designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.

3. Subject to the provisions of paragraph 2 of this Article, the receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

4. The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defense or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State.

Article 32 Exemption from taxation of consular premises

1. Consular premises and the residence of the career head of consular post of which the sending State or any person acting on its behalf is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in paragraph 1 of this Article shall not apply to such dues and taxes if, under the law of the receiving State, they are payable by the person who contracted with the sending State or with the person acting on its behalf.

Article 33 Inviolability of the consular archives and documents

The consular archives and documents shall be inviolable at all times and wherever they may be.

SECTION II. FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO CAREER CONSULAR OFFICERS AND OTHER MEMBERS OF A CONSULAR POST

Article 40 Protection of consular officers

The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.

Article 41 Personal inviolability of consular officers

1. Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.

2. Except in the case specified in paragraph 1 of this Article, consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.

3. If criminal proceedings are instituted against a consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case specified in paragraph 1 of this Article, in a manner which will hamper the exercise of consular functions as little as possible. When, in the circumstances mentioned in paragraph 1 of this Article, it has become necessary to detain a consular officer, the proceedings against him shall be instituted with the minimum of delay.

Article 42 Notification of arrest, detention or prosecution

In the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving State shall promptly notify the head of the consular post. Should the latter be himself the object of any such measure, the receiving State shall notify the sending State through the diplomatic channel.

Article 43 Immunity from jurisdiction

1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

2. The provisions of paragraph 1 of this Article shall not, however, apply in respect of a civil action either:

(a) arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State; or

(b) by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft.

Article 44 Liability to give evidence

1. Members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings. A consular employee or a member of the service staff shall not, except in the cases mentioned in paragraph 3 of this Article, decline to give evidence. If a consular officer should decline to do so, no coercive measure or penalty may be applied to him.

2. The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions. It may, when possible, take such evidence at his residence or at the consular post or accept a statement from him in writing.

3. Members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending State.

Article 45 Waiver of privileges and immunities

1. The sending State may waive, with regard to a member of the consular post, any of the privileges and immunities provided for in Articles 41, 43 and 44.

2. The waiver shall in all cases be express, except as provided in paragraph 3 of this Article, and shall be communicated to the receiving State in writing.

3. The initiation of proceedings by a consular officer or a consular employee in a matter where he might enjoy immunity from jurisdiction under Article 43 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. The waiver of immunity from jurisdiction from the purposes of civil or administrative proceedings shall not be deemed to imply the waiver of immunity from the measures of execution resulting from the judicial decision; in respect of such measures, a separate waiver shall be necessary.

Supreme Court, U. S.
FILED
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CLERK

No. 96-746

In The

Supreme Court of the United States

October Term, 1996

CANADIAN CONSULATE,

Petitioner,

vs.

ARLENE HOLDEN,

Respondent.

On Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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25 pp

QUESTION PRESENTED

Whether a foreign state's termination of the employment of a United States citizen who had been engaged in the promotion of commercial products and had not been employed as a civil servant or as a diplomat constitutes a commercial activity excepting the foreign state from immunity under the Foreign Services Immunities Act.

LIST OF PARTIES

The parties in this proceeding are Petitioner Canadian Consulate and Respondent Arlene Holden.

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H. Rep. No. 94-1487, 94th Cong., 2d Sess. at 16, reprinted at 1976 U.S. Code Cong. & Ad. News 6604 7

Respondent Arlene Holden respectfully requests that this Court deny the Petition for Writ of Certiorari which seeks review of the Ninth Circuit's Opinion below. That Opinion is reported at 98 F.3d 918 (9th Cir. 1996) and is reprinted in the Petition for Writ of Certiorari at 126-137.

STATUTORY PROVISIONS INVOLVED

In addition to those statutes cited by Petitioner, the following statutory provisions, from the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602, § 1603, and § 1606 are involved in this case:

> Section 1602. Findings and Declaration of Purpose.
>
> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter [28 USCS §§1602 et seq.].

Section 1603. Definitions

For purposes of this chapter [28 USCS §§1602 et seq.] --

(a) A "foreign state", except as used in Section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subdivision (b).

(b) An "agency or instrumentality of a foreign state" means any entity --

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in Section 1332(c) and (d) of this title nor created under the laws of any third country.

(c) The "United States" includes all territories and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

Section 1606. Extent of Liability.

As to any claim for relief with respect to which a foreign state is not entitled to immunity under §1605 or §1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances;

. . . .

STATEMENT OF THE CASE

Respondent respectfully opposes the Petition for Writ of Certiorari because the decision below presents no conflict with the law of other Circuits nor infringes upon the sovereign prerogatives of foreign states.

On November 9, 1993, Respondent Arlene Holden filed a wrongful termination action against the Canadian Consulate. That complaint stated five causes of action against the Canadian Consulate: sex discrimination, age discrimination, violation of

public policy (California public policy prohibiting sex discrimination and age discrimination in employment), breach of the implied contract to terminate only for cause, and breach of the covenant of good faith and fair dealing. Ms. Holden's claims were the result of the Canadian Consulate's termination of her long-term employment as a Commercial Officer. In the Spring of 1993, the Canadian Consulate decided to down-size and required that Holden compete with a younger man for the one remaining Commercial Officer position. The younger man, age thirty-two and with the Consulate for only two-and-one-half years, was retained for the position while Ms. Holden, age fifty-seven and with the Consulate for thirteen years, was laid off.

Subsequent to the filing by Ms. Holden of her Complaint for Damages, Petitioner moved to dismiss under Federal Rule of Civil Procedure 12(b) for lack of subject matter jurisdiction contending it was immune from suit under the Foreign Sovereign Immunities Act of 1976 ("FSIA"). In an order dated July 25, 1994, the District Court identified the existence of a disputed issue of fact as to the nature and scope of Respondent's activities with the Canadian Consulate and required that the parties appear for an evidentiary hearing on this issue.

An evidentiary hearing was held on September 8, 1994 and September 9, 1994. Testimony was obtained from Kenneth David McNamara, the former Consul and Senior Trade Commissioner of the Canadian Consulate in San Francisco who had been Respondent's supervisor for a period of time and was one of the individuals involved in the decision to terminate Ms. Holden's employment. Testimony was also obtained from Ms. Holden herself. Documents, including Ms. Holden's job description, resume and a letter of reference prepared by Mr. McNamara for Ms. Holden regarding her former employment with the Canadian Consulate and the responsibilities she held, were made exhibits.

A. The District Court's Findings Of Fact

On November 1, 1994, the district court issued Findings of Fact and Conclusions of Law and denied the motion to dismiss. Petition at 126-137.

The court expressly found that Respondent, a United States citizen, was employed by Claimant, a foreign state as that term is defined under the FSIA, as a Commercial Officer between February 1980 and March 31, 1993. Petition at 127. The Court further noted that, at the time of Holden's hire, the Canadian Consulate had sought as Commercial Officers individuals, such as Holden, who were experts in local marketing and business. *Id.* at 128.

The San Francisco Consulate had employed Holden in the capacity of locally-engaged staff. As a United States citizen, Holden could not be employed in any capacity other than that of locally-engaged staff. *Id.* at 129. The Canadian Consulate treated its locally-engaged staff in a manner different from that in which it treated its foreign service employees: different regulations applied to locally-engaged staff than to foreign service employees; locally-engaged staff were entitled to overtime; locally-engaged staff did not receive any housing assistance or any private schooling for their children from the Canadian government; and locally-engaged staff were not permitted in the Consulate outside the presence of a Foreign Service Officer. *Id.*

The District Court determined that Holden had not been employed by the Consulate in the capacity of a civil servant. She did not compete for any examination prior to obtaining her position with the Consulate. She was not entitled to tenure in her position. She was not provided with the same benefits as that provided foreign service officers. She did not receive any

civil service protections from the Canadian government. *Id.* at 130. Finally, the Court determined that Holden had performed commercial and private activities, not noncommercial and governmental activities for Respondent. *Id.* Specifically, the Court determined that Holden had been primarily engaged in promoting and marketing. She had not been involved in policy-making for the Canadian Consulate had not been privy to any governmental policy deliberations, and had not engaged in any lobbying activity or legislative work for the government. *Id.* The Court set forth, in some detail, the activities in which Holden had been involved. *Id.* at 130-131.

Based on the nature of Holden's activities, the District Court denied Respondent's motion to dismiss, finding that Holden's employment activities were private and commercial in nature, and that the commercial activity exception under the FSIA applied, thus denying immunity from suit to the Consulate.

Petitioner obtained interlocutory review of the district court's order under the collateral order doctrine. *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 779 (9th Cir. 1991). The United States Court of Appeals for the Ninth Circuit affirmed the lower court decision.

B. Reiteration Of The Lower Court's Findings By The Ninth Circuit

The Ninth Circuit reiterated the basic facts as found by the lower court. Because the statutory language at issue required that a plaintiff's cause of action be "based upon" the commercial activity in question (*Gates v. Victor Fine Foods*, 54 F.3d 1457, 1463 (9th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 187, 133 L. Ed. 2d 124 (1995)), the Court recognized that Holden's claim would be "based upon" those activities forming the elements of the claim that would entitle her to relief. *Saudi*

Arabia v. Nelson, 507 U.S. 349, 356-357, 113 S. Ct. 1471, 1477 (1993). Noting that Holden did not challenge the right of Canada to close its consulate, but rather challenged the fact that she was terminated while a younger man was not, the court found Holden's employment to constitute the activity in question.

In determining whether Holden's employment involved a commercial activity the Ninth Circuit adopted the lower court's factual findings, reviewed the nature of Holden's activities, and, additionally, referred to the legislative history of the FSIA. The court adopted the standard suggested by the report of the Committee on the Judiciary of the House of Representatives of the 94th Congress: "Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States." H. Rep. No. 94-1487, 94th Cong., 2d Sess. at 16, reprinted at 1976 U.S. Code Cong. & Ad. News 6604, 6615. The court further cited additional language within the House Report: "Activities such as a government's . . . employment or engagement of laborers, clerical staff or public relations or marketing agents . . . would be among those included within the definition [of commercial activity]." *Id.*

Noting that the Seventh Circuit in *Segni v. Commercial Office of Spain*, 835 F.2d 160, 165 (7th Cir. 1987), had already adopted the analytical framework set forth in the House Report, the court agreed that a determination should be made as to whether Holden had been employed as a civil servant or a diplomatic officer.

The court affirmed the lower court's findings as to the nature of the activities in which Holden had been engaged and that Holden had not been employed as a civil servant. After a full

examination of the facts, the court held that Holden's employment constituted a commercial activity, rendering the Canadian Consulate subject to suit by her.

On August 9, 1996, the Ninth Circuit filed its opinion affirming the lower court's judgment. On November 7, 1996, Petitioner filed the instant Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

BECAUSE PETITIONER'S STATUS AS A CONSULATE IS IRRELEVANT TO DETERMINING EXCEPTIONS TO IMMUNITY, NO NOVEL ISSUES ARE PRESENTED BY THE PETITION.

A. Petitioner's Status As A Consulate Is Irrelevant.

While it is initially presumed that a foreign state is immune from suit, that presumption will be lost where a party presents evidence that one of the FSIA's exceptions to immunity applies. 28 U.S.C. § 1604; *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988). Once a plaintiff has proffered evidence of an exception to immunity, the foreign state must establish by a preponderance of the evidence that such an exception does not apply. Petitioner has twice failed to meet this burden. *Id.*

There is no dispute as to Petitioner's status as a foreign state.[1] Once an entity's status as a foreign state has been confirmed, determinations as to immunity are made regardless of whether the foreign state entity is a political subdivision or

---

1. For purposes of the FSIA, a foreign state includes even those entities that are political subdivisions, agencies, or instrumentalities of a foreign state. 28 U.S.C. § 1603(a).

an agency or an instrumentality. 28 U.S.C. § 1605.[2] In other words, exceptions to immunity will be determined without reference to whether the foreign state is a Consulate, a Commercial Office, or a State Bank. The determination can only be based upon whether the particular conduct giving rise to the claim in question constitutes or is in connection with a commercial activity. 28 U.S.C. § 1605(a)(2); *Joseph, supra,* 830 F.2d at 1023. Petitioner's status as a Consulate[3] and not a company is irrelevant for the determination of whether an exception to immunity exists. *Berdakin v. Consulado de la Republica de El Salvador,* 912 F. Supp. 458, 461 (C.D. Cal. 1995).

Petitioner essentially argues that this Court should grant its Petition in order to decide issues of policy. However, by virtue of the command of the FSIA that issues of exceptions to immunity be decided regardless of the type of foreign state entity involved, no policy issue has been or can be presented. Rather, the only issue presented to the Ninth Circuit and to this Court is

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2. The FSIA distinguishes types of "foreign states" only in § 1608, a section not here at issue.

3. Petitioner's references to the Vienna Convention on Consular Relations, while providing an interesting historical note and an explanation of the role of a Consulate, is of no assistance in determining the issue of Petitioner foreign state's immunity from suit. A foreign state's immunity from suit is determined only pursuant to the FSIA. The immunities set forth in the Vienna Convention, on the other hand, apply only to consular officials and employees. *Joseph, supra,* 830 F.2d at 1021. Furthermore, Petitioner's reference to Consular functions and to obligations of the receiving state improperly focuses upon what the United States Court of Appeals for the District of Columbia Circuit has referred to as "auxiliary provisions" which are of no assistance in determining the essential character of the agreement, *i.e.*, its commercial or noncommercial status. *Practical Concepts, Inc. v. Republic of Bolivia,* 811 F.2d 1543, 1548, 1549 (D.C. Cir. 1987) (Ginsburg, J.).

whether the employment of Arlene Holden, and the termination thereof, constitutes a commercial activity.

The District Court, after a full evidentiary hearing, made factual and legal determinations. These factual and legal determinations were affirmed by the Ninth Circuit. At no time has Petitioner even attempted to argue that the District Court clearly erred in its findings of fact. Fed. R. Civ. P. 52(a); *United States v. United States Gypsum Company,* 333 U.S. 364, 395 (1948); *Louisiana-Pacific Corp. v. Asarco, Inc.,* 24 F.3d 1565, 1576 (9th Cir. 1994). Thus, the only issue presented under the FSIA was and is whether, under the particular fact situation presented, the foreign state is excepted from immunity — not whether a Consulate, by virtue of its status as a Consulate, is automatically immune from suit regardless of the FSIA.

B. Immunity Determinations May Not Be Based Upon A Foreign State's Rationale Or Defense For Its Conduct Nor Upon Policy Considerations.

The Consulate also argues that this Court should grant the Petition for Writ of Certiorari in order that it might find immunity under § 1605(a)(2) so as to avoid intrusive pre-trial discovery. Petition at 12-14. Even the most basic reading of the Foreign Sovereign Immunities Act makes clear that, for purposes of determining subject matter jurisdiction, a foreign state's rationale for its act plays no role. Indeed, this Court has previously held that motivation or affirmative defenses, other than that relating to subject matter jurisdiction, are irrelevant at this stage. *Republic of Argentine v. Weltover, Inc.,* 504 U.S. 607, 614 (1992). Furthermore, the plain language of the FSIA makes clear that, once a foreign state has been found to have lost its immunity, it must be treated in the same manner and to the same extent as a private individual under like circumstances. 28 U.S.C. § 1606.

Indeed, accepting either of Petitioner's arguments, that its status as a Consulate should automatically render it immune from suit or that concerns as to the extent of pre-trial discovery should make it immune from suit, would, in large measure, read the commercial activity exception out of the law, essentially producing a finding that no matter what activity is involved, a Consulate will always be immune from suit under the FSIA. *See, e.g., Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985). Nowhere, either on the face of the FSIA or in its legislative history, does such an intent appear.

II.

THE LOWER COURT'S DECISION IS FULLY CONSISTENT WITH DECISIONS BY OTHER CIRCUIT COURTS.

The Ninth Circuit determined that Respondent's claims against Petitioner were "based upon" her employment. To determine whether Respondent's employment constituted a commercial activity under the FSIA, the court considered the factual findings made by the district court, *i.e.*, that Respondent's activities were primarily promoting and marketing, that she had not been involved in any policy-making, had not been privy to any governmental policy deliberations, had not engaged in any lobbying activity or legislative work for Canada, could not speak for the Canadian government, and was not even allowed in the Consulate unless in the company of a Foreign Service Officer. Petition at 111. The Court determined the nature of Holden's work, promotion of products, to be the type of work regularly done by private persons and, thus, a commercial activity. *Id.* at 112. The Court accepted the lower court's factual finding that Respondent was not a civil servant and further determined, on its own, that Respondent had not been employed by the Canadian

Consulate as a diplomat.[4] Based upon these facts, the Court agreed with the lower court that the commercial activity exception to immunity applied.

The Ninth Circuit's decision in this matter is fully consistent with decisions of other circuits. For example, the Seventh Circuit underwent an analysis similar to that engaged in by the Ninth Circuit when it determined that a third-party national could proceed on his claims of wrongful termination against the Commercial Office of Spain.[5] *Segni v. Commercial Office of Spain,* 835 F.2d 160 (7th Cir. 1987). While the Second Circuit has not yet addressed this issue, the United States District Court for the Southern District of New York has permitted a former secretary to pursue sexual harassment claims against an instrumentality of a foreign state.[6] *Zveiter v. Brazilian Nat. Superintendency,* 833 F. Supp. 1089, 1093 (S.D.N.Y. 1993).

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4. Petitioner itself concedes that it had not employed Respondent as a diplomat. Petition at 16, note 21.

5. That same circuit, the previous year, had determined that claims of unfair labor practices could be brought against the State Bank of India whose employees were United States citizens or United States residents awaiting naturalization, who lived and worked in the United States, who were subject to the obligations and responsibilities of United States citizens, and who were entitled to the protections and benefits provided by United States law. *State Bank of India v. N.L.R.B.,* 808 F.2d 526 (7th Cir. 1986), *cert. denied,* 483 U.S. 1009 (1987).

6. Unlike the lower court in the instant action, the District Court of New York went a step further and found that the employment of a United States citizen by a foreign state constitutes a commercial activity. In another recent decision, the Ninth Circuit, relying in part upon the House Report accompanying the FSIA and upon the Seventh Circuit's decision in *State Bank of India v. N.L.R.B.,* (*supra,* 808 F.2d at 535) similarly found the employment of United States residents to be "well-established as constituting a commercial activity." *Gates v. Victor Fine Foods, supra,* 54 F.3d at 1463.

In 1995, the District of Columbia Circuit found there to be nothing "peculiarly sovereign" about unilaterally terminating an employment contract between a foreign state university and its employees. *Janini v. Kuwait University,* 43 F.3d 1534 (D.C. Cir. 1995). Additionally, the District of Columbia Circuit has found a contract between two agencies for consulting services to constitute a commercial activity. *Practical Concepts, supra.*

As Petitioner points out, the District of Columbia Circuit has also determined that other wrongful termination claims, by virtue of the status of the plaintiffs, were not based upon commercial activities. *See, e.g., Broadbent v. Organization of American States,* 628 F.2d 27 (D.C. Cir. 1980). As ably noted by the Ninth Circuit in its decision below, *Broadbent* involved no commercial activity because the plaintiffs, unlike Respondent Holden, were employed as civil servants. *Broadbent,* 628 F.2d at 33.

Although the lower court did not mention it in its decision, an additional ground exists for distinguishing Respondent's claims against Petitioner from those brought in either *Broadbent* or the other two decisions from the District of Columbia Circuit: *Tuck v. Pan American Health Org.,* 668 F.2d 547 (D.C. Cir. 1981) or *Morgan v. International Bank for Reconstruction and Dev.,* 752 F. Supp. 492 (D.D.C. 1990). Specifically, these cases involved claims brought against international organizations pursuant to the International Organizations Immunity Act, 22 U.S.C. § 288. The present action involves claims made against a foreign state pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602.

International organizations operate subject to a set of rules and immunities different from those of foreign states.[7] In

7. An excellent summation of the atypical situation of international (Cont'd)

deference to the status of international organizations and as a result of the existence of a separate Act relating to international organizations (the International Organizations Immunity Act), the Foreign Sovereign Immunities Act is silent regarding international organizations — § 1603 of the FSIA, the definitional section, makes no mention of such entities.

Recognizing the distinction between international organizations and foreign states, the District of Columbia Circuit in *Broadbent* noted that "foreign states are free to conduct 'governmental' matters through their own citizens" while international organizations are not. *Broadbent, supra,* 628 F.2d at 34. The court inferred congressional intent to apply "commercial activity" status to a foreign state's employment of American citizens, and not to an international organization's employment of such individuals, due primarily to the fact that employees of international organizations are invariably drawn from either American citizens or third-country nationals, while a foreign state has the option not to employ such individuals. *Id.* The court further noted that a foreign state's employment of United States citizens or third-country nationals constitutes a commercial activity. *Id.* at 34. Indeed, *Broadbent* specifically limited its finding of non-commercial status to international organizations. *Id.* at 35 and 36.

The remaining cases cited by Petitioner, *Tuck* and *Morgan*,

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(Cont'd)
organizations can be found in *Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983). The unique laws and immunities extended to international organizations stem from the goal of achieving coordinated international action through multi-national organizations. These organizations necessarily cannot be tied to any particular state or country and must draw their employees from the citizens of the world — unlike foreign states which have the option of employing citizens of their own country. *See, e.g., Broadbent, supra,* 628 F.2d at 34.

deal solely with the issue of the employment practices of international organizations. Like *Broadbent*, both found employment as part of the civil service of an international organization could not constitute a commercial activity.

III.

THE DECISION OF THE NINTH CIRCUIT DOES NOT CONFLICT WITH ANY OTHER COURT'S APPLICATION OF THE FSIA'S LEGISLATIVE HISTORY PERTAINING TO EMPLOYMENT ACTIVITIES.

In its decision below, the Ninth Circuit, like courts before it, reviewed both the nature of the activity presented and the language of the FSIA's legislative history to determine whether the commercial activity exception to immunity applied. While Congress indicated its intent that courts have a "great deal of latitude in determining what is a 'commercial activity'[8], court decisions have been fairly consistent in such determinations. *See, e.g., State Bank of India, Zveiter, Janini, Practical Concepts,* cited *supra* in Section II. Indeed, the only conflict Petitioner notes is a conflict which Congress intended to exist, namely, the distinctions between international organizations and foreign states. Clearly, the legislative history relating to the passage of the FSIA should play no role in interpreting any immunities, or exceptions thereto, provided by the International Organizations Immunity Act.

Finally, contrary to Petitioner's assertions, the lower court did not rely exclusively on Respondent's civil service or diplomatic status. Rather, the lower court reviewed the District Court's factual findings and actively considered the nature of Holden's employment activities. Petition at 111-112. The lower

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8. Petition at 142.

court found the commercial activity exception to apply based not only upon Respondent's non-civil service and non-diplomatic status, but also upon the specific nature of her work, i.e., the promotion of products. *Id.* at 112.

The Ninth Circuit, in referring to and utilizing relevant sections of the House Report, engaged in a practice approved by this Court. "As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent." *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 610 (1991).

After determining that Respondent's cause of action was based upon her employment and recognizing the factual findings of the District Court, the Ninth Circuit employed the analytical framework utilized by the Seventh Circuit, found Respondent's employment akin to that of a marketing agent (such as the Plaintiff in *Segni, supra*), agreed with the lower court that Respondent had not been employed in civil service, made the additional determination that Respondent had not been employed as diplomatic personnel, and found that the nature of the activities involved were commercial and non-governmental. In so doing, the court abided by those principles expressed both in §1605(a)(2) and the legislative history.

The lower court performed exactly that function envisioned by the FSIA, namely, it reviewed the facts at issue and conducted a full analysis of the nature of the activities involved. Petitioner can point to no conflict between circuits nor to any conflict in the application of the legislative history of the FSIA nor to any error on the part of the lower court.

CONCLUSION

For all the foregoing reasons, the petition for writ certiorari should be denied.

Respectfully submitted,

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